No. 15186

United States

Court of Appeals

For the Ninth Circuit

JENNIE R. DUFF and ELIZABETH BRONSON, Appellants,

vs.

H. L. PAGE, APPELLEE.

Reply Of Appellants

Appeal from the United States District Court for the District of Nevada

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REPLY BRIEF OF APPELLANTS

Appellants hereby reply to the brief of the Appellee and shall discuss the various points in the same order and number them in the same manner as they are set forth in the brief of Appellee.

1. IT WAS ERROR FOR THE TRIAL COURT TO REFUSE TO ASK THE JURORS ON VOIR DIRE EXAMINATION IF THEY OWNED STOCKS OR BONDS IN THE AMERICAN CASUALTY COMPANY.

Appellee has admitted in his brief and the authorities which he has cited state, "following the great weight of authority and the better reasoning, counsel for plaintiff is entitled to learn whether any juror is interested in or connected with any insurance or casualty company that may be interested in the case as an insurer of defendant's liability. Clearly one interested in such an insurance company as stockholder or employee would be subject to challenge." (**Daniel v. Asbil, 97 Cal. App. 731, 276 Pac. 149** and quoted in Appellee's brief, page 3)

Apparently, appellee's only contention in this matter is that Appellant's were acting in bad faith and that appellants' only purpose in this question was to put the fact of insurance before the jury. But appellee has not cited any evidence of fact which would even suggest bad faith on the part of appellants. The appellee has suggested that since the jurors had been asked their occupation and none of them worked for an insurance company, it was not necessary to ask them if they owned any stock or bonds. However, it is obvious that a person could own stock or bonds in a company and be interested in that company even though he didn't work for it. Nor has appellee cited a single case or authority to refute the rule cited on page 17 of appellants' opening brief that when an insurance company is in fact interested, good faith will be presumed. Appellee has not cited any cases to question the general law stated at page 14 of appellants' opening brief that such examination is not improper although it incidentally dis-

closes to the juror that an insurance company is, or may be, interested in the result of the action. In other words, appellee's assertion that appellants were acting in bad faith is not supported either in law or in fact. On the contrary, all the rules and presumptions of law support the appellants and all the facts indicate that appellants were acting in good faith for the purpose of determining the qualifications of the jurors. Appellee cited a few scattered cases to the effect that the question should not be asked concerning a particular insurance company. However, that is not the generally accepted law. Appellants again refer the Court to the authorities cited on pages 15 and 16 of their opening brief to the effect that the general rule is that the question may be asked with reference to a designated insurance company, which may be mentioned by name.

Appellants again point out that regardless of what objections the appellee may make to the exact form in which the question was put; as a matter of fact no question on this subject in any form whatsoever was asked of the jurors and the trial Court would not go into this matter at all. Yet it is the incontroverted law, and so admitted by the appellee, that appellants had a right to have the jurors questioned on this subject to determine their qualifications in respect to insurance. It was prejudicial error for the trial Court to refuse to make interrogatories of the jurors on this subject.

2. IT WAS ERROR FOR THE COURT TO REFUSE APPELLANTS THE RIGHT TO RE-EXAMINE THE WITNESS, EARL REMINGTON, CONCERNING HIS STATEMENT THAT DUFF WAS DRIVING TOO FAST.

Once again, appellee has admitted that the law pertaining to this question as set forth in appellants' brief is correct. In other words, a party on re-direct examination does have a right to question the witness and have him explain any inferences or impressions created by the testimony on cross-examination. Appellee takes the position, however, that the questions on re-direct examination were repetitious, that the cross examination was only to show the credibility of the witness' direct examination, and that all plaintiff was trying to do on re-direct examination was re-establish the witness. We submit that a reading of the

testimony of Earl Remington will reveal that the appellee's contentions are without support in the record. Appellee has nowhere referred to the record or pointed out any instance in the testimony where there was repetition or where the credibility of the witness was being attacked on this point.

The direct testimony of Earl Remington is found on pages 152-164 of the Transcript of Record. On direct examination no question was asked and no statement was made as to the speed of the Duff car as it came over the hill or proceeded down the west slope of the hill. No statement of opinion was asked for or given as to whether or not Duff was or was not traveling too fast. The question of Duff's speed was first brought up on cross-examination (Transcript of Record, page 167) when the witness was asked if he had formed any opinion as to how fast the Duff car was going. There, for the first time, the question of speed was discussed and it was at that point that the witness stated that it was his opinion that Duff was traveling too fast for the existing condition. Since this matter was first mentioned on cross-examination, how can the appellee say that this was simply a matter going to the credibility of the witness' direct examination? How can the appellee say that it was repetitious? How can the appellee say that the re-direct examination was merely an attempt to re-establish the credibility of the witness when on this point the credibility of the witness had never been attacked?

The record will show that on cross-examination the witness made a plain and simple statement that in his opinion Duff was driving too fast for the existing condition (Transcript of Record, page 168). Appellee seems to be under the impression that the appellants were trying to get the witness to refute this statement, or that appellants were trying to bring out some inconsistent statement made by the witness at some other time. The authorities cited in appellee's brief are directed toward that thought. But the record will show that this was not appellants' line of questioning. For the first time on cross-examination the witness made a statement about Duff's speed that was not complete and therefore tended to create a misleading im-

pression on the minds of the jury. As pointed out in detail in appellants' opening brief, there were other facts and circumstances which should have been explained so that the jury would have the full explanation of why the witness made that statement. It was not a matter of refuting the statement or trying to claim the statement wasn't made, or to discredit the witness, but it was simply a matter of getting all the relevant facts pertaining to that statement before the jury. In other words, the jury was entitled to a full explanation of all the facts. The appellee agrees that under the law "when one party is permitted to bring out or have a witness testify concerning matters which have not been covered on direct examination the other party should be entitled to go into these matters upon redirect examination." (Appellee's Answering Brief, page 5.)

Therefore, there is no question as to the law and appellants submit that an examination of the record will show that this matter was not mentioned, let alone covered, on direct examination. It would therefore seem that under appellee's own statement of the rule, appellants were entitled to go into the matter on re-direct examination. The failure of the trial court to allow appellants to do this was preudicial error.

3. IT WAS ERROR FOR THE TRIAL COURT TO REFUSE APPELLANTS THE RIGHT TO SHOW THAT IT WAS PRACTICABLE TO DO THE TOWING JOB IN SOME OTHER MANNER.

The appellee's contentions on this point are as follows:

a. That the subject of towing is such a simple procedure that it is within the common knowledge of the average layman and is therefore not the subject of expert testimony.

b. That the testimony would call for an opinion of ultimate fact and would invade the province of the jury.

c. That it is not proof of negligence to prove that something may be done in a different way.

d. That there was insufficient foundation for the testimony.

Appellee has made some general statements of law to support his contentions, which statements as general rules of law are no doubt correct. But appellee has neglected to apply these rules of law to the facts of this case and cited no specific cases to support his contentions. We shall consider each of his contentions in order.

a. This contention fails by its own statement. The average person does not know anything about towing. The appellant frankly asks the Court if they know enough about towing procedures to know whether a towing job is done properly or not. We renew the suggestion made in the opening brief that the Court read the appellee's description of the towing job in question as found in the testimony at pages 299-302 of the Transcript of Record. The Court will realize from this statement by the defendant himself that towage is a very technical and complicated operation. In fact, the defendant's whole testimony as to the description of his wrecker and his activities on the night of the accident would convince anyone that towage is not something that is within the common knowledge and understanding of the average juror.

As a question of law, appellee has not cited one single case to support his contention that towage is not a proper subject for expert testimony, while, on the other hand, appellants in their opening brief cited numerous cases and specific instances to show that mechanical operations and procedures such as towage are a proper subject for expert testimony.

b. The offered testimony would not invade the province of the jury. A reading of the record will show the Court that the offered testimony was not an attempt to draw any statements from the witness as to the right or wrong way to do the job or to solicit any opinions as to negligence or non-negligence. The offered testimony went solely to custom of doing the job and whether or not it was practical in this particular case to follow the custom. Appellants on page 23 of their opening brief cited authority that evidence of custom and usage is admissable on the question of negligence. This is uncontroverted law and appellee has

cited no case or any other authority in opposition thereto. The evidence of custom and usage was proper evidence to be considered by the jury in determining the issue of negligence and did not at all invade the province of the jury or take away their right to determine the ultimate question of negligence.

In any event, when the subject is a proper one for expert testimony such as in this case, opinions as to ultimate facts may be admitted. This is one of the very basic fundamentals of law dealing with the subject of expert and opinion testimony. This principle is recognized in the authorities cited by appellee on pages 8 and 9 of his brief. Another statement of the rule is found in 32 **C.J.S.,** pages 75-76:

> "When the conclusion to be drawn from the facts stated depends on professional or scientific knowledge or skill, not within the range of ordinary training and intelligence, the conclusion may be stated by a qualified expert, even though it is the statement of an ultimate fact to be found by the jury. Expert opinion testimony on ultimate facts has been allowed in evidence under particular circumstances as a factor to be weighed and considered by the jury in the final determination of the case, although an expert witness cannot state conclusions on the whole case by summing up the entire issue. An expert may not invade the province of the jury by stating his conclusions as to an ultimate fact when his conclusion is based on conflicting evidence in the case, but his conclusion may be received in evidence if it is based on hypothetical facts which fairly reflect the facts in evidence."

It is appellants' contention that the offered testimony was not going to the ultimate facts of the case, but that it was evidence of custom, usage, and other methods of doing the job, which evidence is admissable on the question of negligence. However, even if it were going to the ultimate facts, such testimony should be admitted under the above stated principles of law as they apply to this case, for as we have already shown the question of towage is not

one within the range of ordinary training or understanding.

c. The appellee had contended that it is not evidence of negligence to show that something may be done in a different way. However, appellee has not cited one single bit of authority for this proposition. Appellants refer the Court to the following authorities cited in their opening brief which specifically hold contrary to the appellee's contention:

137 **A.L.R.,** page 611

Blashfield Ency. of Auto. Law, Vol. 9, Par. 6186.5

Brigham Young University v. Lillywhite, 118 Fed. (2nd) 836.

The question of usage or custom is also involved here, since the offered testimony would show that the custom was to do the job in a different way than the defendant was doing it. We have already pointed out that evidence of usage or custom is admissible on the question of negligence.

However, the matter goes much deeper than that in this case. The defendant had testified that there was no other practical way to do the job (Transcript of Record, pages 297-303). Also as a matter of law the Court instructed the jury that the wrecker could not block the highway any longer than was necessary. (Transcript of Record, pages 326-327, Instruction 26). The offered testimony as to practicability of other methods of doing the job went directly to these two issues. First, to refute the defendant's statement that it couldn't be done in any other way, and, second, to put evidence before the jury that it was not necessary for the wrecker to be blocking the highway. How else could the testimony of the defendant be refuted? How else could the jury be informed that it was not necessary for the wrecker to block the highway except to show that there was another practical method to do the job? Whatever the general rules may be, the question of whether or not there was another practical method of doing the job was a material issue in this case and evidence on that point should have been admitted.

d. Appellee contends that no sufficient foundation was laid for this testimony. Appellants will submit this question on the record (Transcript of Record, pages 350-361). The witness testified that he had many years of experience as a towman in the vicinity of Elko, Nevada, and that he was familiar with the conditions and terrain at the place of the accident and that he knew of the towing customs in that vicinity at that time. We submit to the Court that the hypothetical questions contained all the essential elements. Things mentioned by the appellee in his brief as necessary were road conditions, weather conditions, type of equipment, time of day and so on. The hypothetical question found at page 354-355 of the Transcript of Record describes in detail all of these items, not only by description but by the use of pictures, exhibits, and diagrams on the blackboard. We submit that the appellee's objections on these grounds is not supported by the record.

Nor are they supported as a matter of law. Once again appellee has not cited a single case to support his contention. The law is that in making objections to the qualifications of an expert witness or to a hypothetical question, the objections must be specific so the other party can correct any omissions, or offer further qualifications. In other words, it isn't sufficient to just object for lack of foundation without pointing out specifically what is lacking. The appellants in this case were never given a chance to offer further qualifications or supply any omissions that may have been made in the hypothetical questions.

> "Since objections to hypothetical questions asked expert witnesses must be specific, a general objection is insufficient to raise the point that the question is improper as omitting necessary facts, or as assuming facts not in evidence. In such case the objection should point out what necessary facts were omitted, or which facts were included which were not proved. An objection that a hypothetical question assumed a state of facts not in controversy, irrelevant, incompetent, and no foundation laid, is insufficient to raise the point that it was not a proper hypothetical question." 88 **C.J.S.,** page 262.

In **Hobbs v. Union Pac. R.R.,** (Idaho) 108 Pac. (2nd) 841, it was held that objection to expert testimony because "no proper foundation laid" was not sufficiently specific.

Also to the same effect **Willard v. St. Paul City Ry. Co.** (Minn.) 133 N. W. 465.

We submit that the record will substantiate the appellants' position in this matter, that the witness was properly qualified, and that the questions were properly asked.

4. THE COURT ERRED IN REFUSING TO STRIKE THE DEFENDANT'S STATEMENT THAT HIS WRECKER WAS AN EMERGNCY VEHICLE.

Appellee's only response to this matter is that it could not have had any effect on the jury. Yet it remains undisputed that the statement was erroneous and should have been stricken. The case went to the jury with the undisputed statement in the record that the wrecker was an emergency vehicle. Who can say what the jury may have thought about this statement, or whether or not they disregarded it? It would be more natural to assume that they did consider it than that they completely disregarded it. The other instructions, being general in nature, would not correct this matter. The instructions speak about ordinary care and things that were reasonably necessary under the circumstances. The jury might very well of thought that something might be ordinary and reasonable under the circumstances for an emergency vehicle that would not be ordinary and reasonable for other vehicles. In other words, the jury could have followed all of the instructions of the Court and still been prejudiced by this statement. As we tried to point out in our opening brief, the very mention of emergency vehicle is the kind of thing that in and of itself incites high emotions and feelings in people and is not something that they are apt to disregard without specific instructions to do so. We feel that this matter was highly prejudicial.

5. THE COURT ERRED IN REFUSING OFFERED TESTIMONY AS TO CUSTOM AND USAGE IN PUTTING OUT FLAGS, OR OTHER WARNING DEVICES.

Appellee has not questioned or refuted the appellants' statements of law on this matter and apparently concedes that such evidence is normally admissible. Appellee seems to have two contentions. First, that the matter was covered by other witnesses and, second, that the absence of such signals could not have been the proximate cause of the accident.

In reference to the first contention, appellee fails to point out any place in the record where this matter of putting out flags and warnings and the custom of tow men in respect thereto is covered by other witnesses. Appellants have not been able to find any such evidence in the record unless it is the self serving statement of the defendant that he didn't think it was necessary to put out any signals.

This is a matter that goes to the negligence of the defendant and appellants were entitled to show usages and customs in this respect, and this subject was not mentioned, or covered by any other witnesses.

Whether the absence of such warnings was, or was not, a proximate cause of the accident is for the jury to decide and not the appellee. If there had been a warning flag at the top of the hill, the jury could very well have decided that the accident may not have happened. Appellee claims that the evidence shows that the wrecker was visible for a great distance. The evidence was in conflict on this matter and the jury could just have easily decided one way as the other. Under rules of law which the appellee has not disputed, the appellants had a right to offer evidence as to flags and warnings and it was error to reject this testimony.

6. THE COURT ERRED IN GIVING INSTRUCTION NO. 12.

This is the instruction that deals with the duty of a driver to keep a lookout. Appellant in this case is not try-

ing to assert the proposition that a driver is not obligated to keep a lookout. Appellants assert that the instructions, as given, places undue emphasis on the words "clearly and plainly visible without defining to the jury any standard by which they may determine what is clearly and plainly visible. The cases cited in the opening brief suggest some of the things that should be taken into consideration, such as distractions, obstructions, confusing situations, and the right which a driver has to assume that the road is clear. The fact that these cited cases may have been decided as matters of law, only makes it more apparent that these same factors should be taken into consideration when the question is close enough to require submission to a jury.

An instruction given on this subject should have been clear and comprehensive enough to define plain sight and suggest what the jury was entitled to consider in connection therewith. The appellants requested that certain additions be made to this instruction and the Court refused. We believe it was prejudicial error to give this instruction without at least making the additions requested by the appellants. Appellee suggested that the question of whether or not the wrecker was clearly and plainly visible has been resolved against the appellants by the jury. We suggest that the reason it was so resolved against the appellants is that the jury was not properly instructed on that subject.

7. THE COURT ERRED IN REFUSING TO GIVE APPELLANTS' OFFERED INSTRUCTION A.

This is the instruction dealing with the separate rights of the plaintiffs. The appellee does not question the law that the rights of the various plaintiffs should be dealt with separately, but he feels that the same has been adequately covered in other instructions.

While there were many instructions on the rights, duties and defenses of the various plaintiffs, there is no clear cut simple instruction telling the jury to consider the rights of the plaintiffs separately. The jury could easily get confused in a case such as this where the issues are complex. Under the law stated in the opening brief, appellants

believe they are entitled to this instruction as a matter of right, and it was error to refuse the same.

8. THE COURT ERRED IN REFUSING TO GIVE APPELLANTS' OFFERED INSTRUCTION G.

This is the instruction that deals with defendant's wrecker as an emergency vehicle. Appellants have covered this matter in No. 4 of this brief. For the reasons stated therein appellants were prejudiced by the Court's refusal to give this instruction.

9. THE COURT ERRED IN REFUSING TO GIVE APELLANTS' OFFERED INSTRUCTION I.

This is the instruction dealing with the Nevada Statute in reference to parking on the highway.

Apparently the appellee does not refute the merits of this instruction, or the law relating thereto, at least he has not so stated in his brief. Therefore, the appellants again urge upon the Court the considerations in connection with this instruction which are set forth in the opening brief.

The appellee has objected to the procedural manner in which this issue was raised. Appellee says the appellants did not object to the Court's refusal to give this instruction. A complete reading of the transcript of record in reference to settling instructions will show that the appellee is only playing with words (Transcript of Record, pages 306-314). The record will show that the plaintiffs presented to the Court certain instructions, some of which were given and some of which were not. Of those which were not given, a group was selected and lettered from A to M and a formal request was made of the Court to give these instructions, which request was refused by the Court. It is obvious from reading the record at page 309 that this group of Instruction lettered from A to M were those instructions which had been rejected by the Court and to which rejection the plaintiffs had taken exception. At page 309 of the record a formal offer of these instructions is made by the plaintiffs and a formal rejection is made by

the Court. We contend that nothing more is required to show that plaintiffs objected to the refusal to give these instructions. The intent is clear from the record. Also at page 313 of the Transcript of Record, the plaintiffs said at the conclusion of the settling of instructions, "If the Court please, may I have the record show that in the offer of the instructions of A to M, inclusive, that each of the plaintiffs severally request each and every one of the instructions from A to M, inclusive."

The above language, although not using the word "objection," is clearly stated and equivalent to an objection and shows clearly, positively and unmistakably that plaintiffs were reserving an exception to the refusal of the Court to give these instructions. The record leave no question as to the intent of the parties and as to the substance of what actually happened at the settling of instructions. The law will not allow the substantive rights of the parties to be defeated by a mere form of words.

In this connection we call to the attention of the Court Rule 46 of the Federal Rules of Civil Procedure that "formal exceptions to rulings or orders of the Court are unnecessary." It has been held that Rule 51 of the Federal Rules of Civil Procedure in reference to objecting to instructions must be read in conjunction with said Rule 46.

Wright v. Farm Journal (C.C.N.Y., 1947) 158 Fed. (2nd) 976.

Williams v. Powers (C.C.A. Ohio, 1943) 135 Fed. (2nd) 153

Montgomery v. Virginia Stage Line (1951) 191 Fed. (2nd) 770.

It is held in the cases on this subject that the purpose of objections to instructions is to inform the trial judge of possible errors and if the trial judge is clearly advised, it is sufficient. The Court said in **Howers v. Roberts,** (C.C.A., Mo., 1946) 153 Fed. (2nd) 726:

"The purpose of this rule concerning objections to instructions is to insure that the trial judge is informed of possible errors and to give him an opportunity to correct them and it is sufficient if the point urged on appeal was called to the attention of the trial court in such manner as clearly to advise it as to the question of law involved."

And in **Williams v. Bowers,** Supra, "This rule should be read in conjunction with Rule 46, the purpose of the rule being to inform the trial judge of possible errors which he may correct, and where the record discloses that the point urged on appeal was called to the attention of the trial judge in such manner as to clearly advise him of the question of law involved, that is sufficient."

Also see **U.S. v General Motors Corp.,** (C.A., Del. 1955) 226 Fed. (2nd) 745, which holds the same thing.

In the **Howers v. Roberts** case mentioned above, the facts were similar to the case at bar. The plaintiff had orally requested that certain instructions be given, but the judge refused to give the same and indicated his reason therefor. The appeal Court held that notwithstanding the plaintiff's failure to object or explain her contention in regard thereto more fully, the refusal of instruction was preserved for appeal.

The record in this case is sufficiently clear to show that plaintiffs' offered instructions A to M were fully considered by the trial court and that the court and all the parties were fully aware of the points of law involved therein. When these particular instructions A to M were picked out of all the other instructions offered by plaintiffs and specially lettered for identification and included in the record in that manner, it was the understanding of all the parties and also the understanding of the trial court that these were the refused instructions that the plaintiffs were reserving for exception. Under the law as cited above this was sufficient.

10. THE TRIAL COURT ERRED IN REFUSING TO GIVE APPELLANTS' OFFERED INSTRUCTION J.

This is the instruction defining what the jury may take into consideration in determining whether an object is clearly or plainly visible. This subject has been covered under point No. 6 herein.

11. IT WAS ERROR FOR THE TRIAL COURT TO REFUSE TO GRANT APPELLANTS' MOTION FOR A NEW TRIAL.

Appellees only contention in reference to this matter is that the question to be decided on a motion for new trial is whether the jury might have reasonably found from the evidence as they did Appellee has cited no authority for this contention nor has appellee cited any authority contrary to the cases cited in appellants' opening brief. The authorities there cited hold it is the judge's duty on a Motion for New Trial to prevent a miscarriage of justice even though there might have been some evidence to support the verdict of the jury. We will stand on these authorities and re-urge them upon the Court.

Considering the evidence as a whole and the errors of law which have been urged on this appeal, it was the duty of the trial court to grant a new trial to prevent a miscarriage of justice.

In conclusion appellants submit that the appellee has not cited any substantial authority or given any other substantial refutation to the errors which have been specified in this appeal. These errors have been summarized in appellants' opening brief at page 44 and 45, and by reason of said errors the appellants were prejudiced and prevented from having a fair and impartial trial. Appellants submit that the judgments against the appellants and the Order

denying motion for a new trial be reversed and the case be remanded to the trial Court with proper instructions.

Respectfully submitted,

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BY George F. Wright

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